

SERVED: May 13, 1993

NTSB Order No. EA-3874

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 28th day of April, 1993

_____)	
JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11136
v.)	
)	
MARIO T. DEFELICE,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The Administrator has appealed from the oral initial decision of Administrative Law Judge Joyce Capps, issued at the conclusion of an evidentiary hearing on November 14, 1990.¹ The law judge reversed an order of the Administrator suspending respondent's airline transport pilot certificate for 120 days due to an incident in which respondent allegedly took off without

¹A copy of the decision, an excerpt from the hearing transcript, is attached.

clearance in violation of sections 91.87(h) and 91.9 of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91.² The Board reverses the initial decision and reinstates the order of suspension.

The Administrator's amended order of suspension alleged, in pertinent part, the following facts:

1. You are the holder of Airline Transport Pilot Certificate No. 158387998.
2. On or about June 12, 1988, you were the pilot-in-command of a Bell 222 Helicopter, registration No. N424WW, in the vicinity of Teterboro Airport, Teterboro, New Jersey.
3. During the above-described flight, you were cleared to taxi by the Teterboro Air Traffic Control (ATC).
4. You acknowledged this clearance.
5. You were also instructed by ATC to contact the tower on frequency 119[.]5 for further instructions.

²FAR section 91.87(h) and 91.9 provided in pertinent part at the time of the incident as follows:

§ 91.87 Operation at airports with operating control towers.

* * * * *

(h) *Clearances required.* No person may, at any airport with an operating control tower, operate an aircraft on a runway or taxiway, or takeoff or land an aircraft, unless an appropriate clearance is received from ATC. A clearance to "taxi to" the takeoff runway assigned to the aircraft is not a clearance to cross that assigned takeoff runway, or to taxi on that runway at any point, but is a clearance to cross other runways that intersect the taxi route to that assigned takeoff runway. A clearance to "taxi to" any point other than an assigned takeoff runway is a clearance to cross all runways that intersect the taxi route to that point.

§91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

6. You failed to acknowledge this instruction and you took off without authorization of ATC.

7. Because of your actions, your aircraft came into conflict with Mooney M4702H which had been cleared for takeoff by ATC.

The issues disputed at the hearing were whether respondent did in fact request clearance to take off and whether he believed that he received it. The law judge made a credibility determination in favor of respondent on both points. Her determination was based, at least in part, on the following portion of the tower tape transcript:

1646:34 51W "Unintelligible"

1646:36 LC King Air Eight Sierra Tango Runway Two
Four Cleared for takeoff

1646:38 8ST Five Eight Sierra Tango roger

The law judge credited respondent's testimony that the unintelligible portion of the transcript must have been respondent's aircraft requesting clearance, and that, because the first half was "stepped on,"³ respondent only heard the second half of the next transmission so that it sounded like, " . . . Two Four Cleared for takeoff," which he understood to be their clearance.⁴ The law judge noted that the airport was very busy at the time of the alleged incident and that there was at least one other instance on the tower tape of a stepped on communication. The law judge also noted, however, that there was

³"Stepping on" occurs when there are two simultaneous transmissions, so that one overrides the other.

⁴According to respondent, N424WW attempted 3 or 4 times to contact the tower to obtain takeoff clearance.

no acknowledgement by respondent of the clearance.

The law judge gave weight to the fact that respondent called back and reported his position after takeoff. She believed that he would not have done so if he had just taken off without a clearance. However, the Administrator noted in his brief that, as there was only one helicopter in the area at the time, respondent was not likely to escape detection.

The Board is reluctant and has no basis here to disturb the law judge's credibility determinations made at the hearing because they are presumably based on direct observations of witness demeanor. Our difficulty with the law judge's analysis, however, has nothing to do with credibility analysis. She simply stopped too soon. The key issue is not whether respondent was credible or whether respondent believed he had a clearance. Instead, the key issue here is whether respondent reasonably believed he had a clearance. Thus, the credibility issues at the core of the initial decision do not resolve the matter. Indeed, we need not review any of them to grant the appeal.

Respondent may have thought he had a clearance, but he had inadequate basis for that belief and, as such, he violated § 91.87(h), and was careless as well. At 1646:36, and using the law judge's credibility findings, respondent heard part of a clearance directed to another aircraft. However, respondent misheard and misinterpreted that transmission.

Aviation communication standards and practices anticipate such events and prevent confusion and potential accidents by

requiring acknowledgment of clearances. Because it is not uncommon for pilots to mishear clearances, compliance with clearances is promoted by a full readback. Significantly, there is no evidence in the record that respondent acknowledged the clearance that he (mistakenly) believed was for him. In fact, the respondent equivocated, unable to recall any details regarding acknowledgment or radio communication at the critical point. Tr. at 187-189.⁵

Nor is there any indication in the transcript that an acknowledgment transmission was stepped on. There is nothing concrete in the record to support the law judge's suggestion (Tr. at 220) that a squelch occurred.⁶ A squelch would be heard, as it was at 1646:34. We also note the unrebutted testimony (Tr. at 55-56) that standard practice was to use the last three characters of the registration (4WW), not the two heard here (24), as the aircraft's alternate call sign. This, also, should have alerted respondent to a possible communication problem.

In the circumstances, and especially considering respondent's testimony of prior difficulty communicating with the tower (Tr. at 166), respondent's failure to confirm his understanding prevented the mistake from being brought to his attention, whereupon he commenced the takeoff without a

⁵Respondent testified (*id.* at 187) that he believed they acknowledged the clearance but "we may have not heard it." This makes no sense.

⁶The suggestion is contrary to her specific finding (Tr. at 216) that there was no clearance acknowledgment from respondent's aircraft.

clearance. Respondent failed to take all the actions prudence and safety required of him. Compare Administrator v. Frohmuth and Dworak, NTSB Order EA-3816 (1993).⁷

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The Administrator's order of suspension is affirmed;
and
3. The 120-day suspension of respondent's airline transport pilot certificate shall begin 30 days from the date of service of this order.⁸

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁷In that case, the crew also appropriated a clearance meant for another aircraft. The crew acknowledged this clearance, but the acknowledgment was squelched, and the squelch was heard only by the tower. As the crew took all possible action that would have brought its mistake to its attention, and tower language contributed to the misunderstanding, we dismissed the complaint.

Respondent does not argue in this case that actions or inactions of air traffic control contributed to the incident.

⁸The 120-day suspension proposed by the Administrator took into account respondent's prior violation of 14 C.F.R. 91.90, 135.293(a) and 91.9. (The 91.90 violation involved entry into a Terminal Control Area without an appropriate clearance.) We have no basis in this record to modify the suspension period, and it is not inconsistent with our precedent regarding this type of violation and violation history.

For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).